

ROBERT KANE (CSB No. 71407)  
LAW OFFICES OF ROBERT KANE  
870 Market Street  
San Francisco California. 94102  
Tel: (415) 982-1510; Fax: (415) 982-5821  
Rkane1089@aol.com

PAUL B. COHEN (CSB No.148371)  
BROOKE THATCHER (CSB No. 228637 )  
LEGAL AID OF MARIN  
30 NORTH SAN PEDRO ROAD  
SAN RAFAEL, CALIFORNIA 94903  
Tel: (415) 492-0230; Fax: (415) 492-0947  
bthacher@legalaidofmarin.org

SHIRLEY HOCHHAUSEN (CSB No. 145619)  
COMMUNITY LEGAL SERVICES IN  
EAST PALO ALTO  
2117-B University Avenue  
East Palo Alto, CA 94303  
Tel: (650) 326-6440; Fax:(650) 326-9722  
S\_Hochhausen@hotmail.com

Attorneys for PLAINTIFF Audrey McNamara Nevis

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

AUDREY MCNAMARA NEVIS,

Plaintiff,

vs.

WELLS FARGO BANK, EXECUTIVE FINANCIAL  
LENDING, INC., JOHN B. SPEAR, SHAI MOSHE,  
GATEWAY TITLE COMPANY, QUALITY LOAN  
SERVICES CORP. and DOES 1 - 100, inclusive,

Defendants.

Case No. C 07 - 2568 MHP

**FIRST AMENDED  
COMPLAINT FOR INJUNCTIVE  
RELIEF, RESCISSION,  
RESTITUTION, DAMAGES,  
PUNITIVE DAMAGES, AND  
ATTORNEY FEES**

**JURY TRIAL DEMANDED**

**INTRODUCTION**

1. Audrey Nevis ("Plaintiff") is an 82 year old woman who has lived in her own home in Marin County, California for 18 years. Due to the fraudulent, deceptive and negligent acts and practices of the Defendants that are the subject of this complaint Plaintiff faces

1 foreclosure and the loss of her home.

2 2. Plaintiff seeks to stop Defendants from going forward with the foreclosure sale of  
3 her home and to recover the more than \$80,000 in costs fees and interest that she paid for an  
4 exploitive and illegal home loan.

5 3. The loan which is the subject of this action is presently owned by Wells Fargo  
6 Bank ("Wells Fargo"). The loan was originally made by New Century Mortgage Company  
7 ("New Century") who continues to service the loan. New Century has filed for bankruptcy  
8 protection and is protected from suit by the automatic stay provisions of the Bankruptcy Act and  
9 is consequently not a defendant in this action. Wells Fargo has retained Quality Loan Services  
10 ("Quality") to carry out the foreclosure.

11 4. At all time relevant to this complaint, New Century was a corporation engaged in  
12 sub-prime home mortgage lending and engaged in acts and practices that targeted the financially  
13 unsophisticated, the elderly, female and minority customers, which acts and practices include  
14 deceptive promises about the home mortgage loans, "juicing" mortgages with hidden rates and  
15 fees, flipping loans by refinancing to generate fees, making loans based on the value of the  
16 property rather than the income of the borrower, making loans that they know or should know  
17 cannot be repaid by low income borrowers and marketing their loans through brokers whom they  
18 know or should know forge and misrepresent applications and fail to deliver statutorily  
19 mandated disclosures to borrowers.

20 5. New Century is presently subject of investigations by the Securities and Exchange  
21 Commission ("SEC") and the California Attorney General who has obtained a Cease and Desist  
22 Order enjoining New Century from soliciting or accepting either directly or indirectly any  
23 residential mortgage loan applications based on the findings that New Century failed to  
24 demonstrate the financial responsibility, character and general fitness that would support the  
25 belief that the business will operate honestly, fairly and in accordance with the requirements of  
26 the California Finance Lenders Law.

27 6. Plaintiff is informed and believes and thereon alleges that notwithstanding its  
28

1 failures in oversight, underwriting, risk management, and pending investigations by the  
2 California Attorney General and the SEC, New Century sold the loan which is the subject of this  
3 action to Wells Fargo.

4 7. In addition to investigations by the SEC and California Attorney General, a further  
5 investigation of the loan which is the subject of this complaint and the conduct of New Century  
6 are the subject of an investigation by the Marin County District Attorney.

7 8. Plaintiff is informed and believes and on that basis alleges that Defendants were or  
8 should have been aware of the pending investigation by the Marin County District Attorney as  
9 they were contacted by telephone by the office of the District Attorney and by Plaintiff's  
10 counsel, Brooke Thacher of Legal Aid of Marin. On May 9 and 10, 2007, Plaintiff's counsel  
11 advised Wells Fargo in writing through their foreclosure agent Quality Loan Services  
12 ("Quality") that the loan which is the subject of this action was rescinded pursuant to the  
13 provisions of the Truth in Lending Act ("TILA").

14 9. Plaintiff is informed and believes and on that basis alleges that Defendants Wells  
15 Fargo and Quality were or should have been aware of Plaintiff's claims that the loan was  
16 fraudulent and was designed not to be repaid, and failed to provide Plaintiff with disclosures  
17 mandated by federal and state law and nonetheless proceeded to record a notice of default on the  
18 property and scheduled the foreclosure sale for May 21, 2007.

19 **JURISDICTION AND VENUE**

20 10. This Court has personal jurisdiction over the Defendants named herein because a  
21 substantial portion of the wrongdoing alleged in this complaint took place in the Northern  
22 District of California, and the Defendants are authorized to and regularly do business in the  
23 Northern District of California

24 11. This is an action for violations of TILA (15 U.S.C. §§1601 *et seq.*) and the Real  
25 Estate Settlement and Procedures Act ("RESPA" (12 U.S.C. §2602) Plaintiff further invokes the  
26 pendent jurisdiction of this Court to consider claims arising under state law. Jurisdiction is thus  
27 founded on 28 U.S.C. §§1331 and 1367.  
28



1           18. Plaintiff is informed and believes and on that basis alleges that defendant Shai  
2 Moshe ("Moshe") was at all relevant times an employee of Executive and the salesman who  
3 solicited the Plaintiff to make the subject loan and who was the primary point of conduct in the  
4 making of the subject loan.

5           19. Plaintiff is informed and believes and on that basis alleges that Quality Loan  
6 Services Corp. ("Quality") is a California Company specializing in real estate services including  
7 foreclosures. On information and belief they have been retained by New Century to carry out  
8 the foreclose on Plaintiff's home.

9           20. Plaintiff is informed and believes and on that basis alleges that Gateway Title  
10 Company ("Gateway") is the title company and escrow agent that handled the "closing" of the  
11 loan which is the subject of this action.

12           21. The true names and capacities, whether individual, corporate or otherwise, of  
13 Defendants named in this action as Does 1-100, inclusive, are unknown to Plaintiff who  
14 therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes and  
15 on that basis alleges that each of the fictitiously named Defendants is in some manner legally  
16 responsible for the events and damages Plaintiff alleges in this complaint, contributed to the  
17 wrongs and damages herein alleged, or claim a legal or equitable right, title, stake, lien or  
18 interest in the property which is the subject of this action. Plaintiff will amend this complaint to  
19 allege the true names and capacities of the fictitiously named Defendants when they have been  
20 ascertained.

21           22. Plaintiff is informed and believes and on that basis alleges that each defendant was  
22 the agent and/or employee and /or principal of each of the remaining Defendants, and in doing  
23 the acts herein alleged, were acting within the course and scope of such agency and employment,  
24 and/or with the knowledge, consent, or authority of each of the remaining Defendants and/or  
25 with knowledge of their acts and/or wrongdoing. By virtue of the foregoing, each defendant had  
26 knowledge and/or constructive notice of, and/or authorized and consented to the acts of each of  
27 the other Defendants, and/or ratified the wrongful acts of each of the other Defendants, as herein  
28

1 alleged, by among other things, retaining and sharing in the benefits of such acts.

2 23. Plaintiff is informed and believes and on that basis alleges that Defendants, and  
3 each of them, knowingly and willfully entered into an agreement or agreements and/or  
4 conspiracy or conspiracies with the other Defendants to do some or all of the acts herein alleged.

5 24. Plaintiff is informed and believes and on that basis alleges that the Defendants, and  
6 each of them, negligently employed and retained employees and/or agents and failed to properly  
7 supervise, train, direct and/or control their actions.

8 **GENERAL FACTUAL ALLEGATIONS**

9 25. Plaintiff realleges and reincorporates by this reference the allegations of  
10 Paragraphs 1 through 24.

11 26. Plaintiff is an 82 year old retired woman residing in Marin. County. Plaintiff has a  
12 high school education, is financially unsophisticated, retired from employment and subsists on  
13 an income from Social Security in the amount of \$1,080 per month.

14 27. In or about 1988, Plaintiff purchased a home at 16 Creekside Dr., San Rafael,  
15 California, for about \$300,000. As of February 2007, the Property had a value of about  
16 \$930,000 with a mortgage of about \$880,000 on which Plaintiff had a monthly mortgage  
17 payment of \$ 5,739.95.

18 **Defendants' Scheme to Defraud Plaintiff Begins With a "Cold Call"**

19 28. In September 2006, Moshe made a "cold call" to Plaintiff in a purported effort to  
20 sell her a mortgage loan. At the time, Plaintiff was concerned about meeting her financial  
21 obligations. Plaintiff told Moshe that while she had refinanced her home in the past, she had  
22 been unable to refinance recently and that she had been turned down by other lenders. Moshe  
23 told the Plaintiff not to worry, that he was very well connected and that he would produce a loan  
24 for her at "no cost" with a monthly payments on the new loan which would be significantly  
25 lower than her prior payments. Moshe also promised that the loan he would get Plaintiff would  
26 pay off her existing debts and provide a sum of cash so that she could make the monthly  
27 payments on the proposed loan.  
28

1           29. Moshe requested further information regarding the property and Plaintiff's  
2 employment prior to her retirement. When Plaintiff told Moshe that she had been a stewardess,  
3 he said "I can work with that" and further assured her that he could get the promised loan.

4           30. Shortly after this first call, Moshe advised the plaintiff that he would fax some  
5 papers to the local Kinko's. He instructed her to sign the papers and return them to him by fax.  
6 Among the papers that Moshe sent was an application containing the false information that  
7 Plaintiff was employed as travel agent.

8           31. Upon reading the papers and seeing the incorrect employment information,  
9 Plaintiff telephoned Moshe and told him that the information was incorrect. Moshe told her not  
10 to worry, to sign the papers and that this was just "standard operating procedure".

11           32. Soon after the initial conversation, Moshe telephoned Plaintiff to advise her that  
12 she had been "approved" for a loan in the amount of \$880,000. He instructed her that an  
13 "independent notary public would come to Plaintiff's home with the loan documents and that the  
14 Plaintiff was to sign as she was instructed to by the notary."

15           33. On or about June 8, 2006, a notary did come to the Plaintiff's home. The notary  
16 flipped the pages of a pile of documents and directed Plaintiff where to sign and Plaintiff signed  
17 as directed. The notary left some documents with Plaintiff and the escrow was handled by  
18 Gateway.

19           34. At the time of soliciting and assisting the Plaintiff in getting the subject loan  
20 Defendants knew or should have known that Plaintiff was 81 years old, financially  
21 unsophisticated, unemployed with a total average monthly income of about \$1,050, and that she  
22 had been unable to refinance her home despite having contacted other lenders. They knew or  
23 should have known that Plaintiff was not qualified for a mortgage on her income of \$1,050.

24           35. Defendants knew or should have known that Plaintiff could not pay \$5,739.95 per  
25 month and that the loan would very soon fall into default and the property would be sold in  
26 foreclosure. The subject loan was designed to earn fees for Defendants and not to be of benefit  
27 to Plaintiff.  
28

1           36. At the time these false promises and misrepresentations alleged above were made,  
2 Defendants knew or should have known that the representations were false, that the loan they  
3 were inducing Plaintiff to take was a high priced loan, beyond her ability to repay, a variable  
4 rather than a fixed loan, that it would increase the amount of her monthly payment and that  
5 Plaintiff had insufficient income to repay the subject loan.

6           37. At the time Defendants made the false promises, misrepresentations and  
7 concealments alleged above, Plaintiff did not know that those promises and representations were  
8 false, or that the Defendants had fraudulently concealed that they knew that Plaintiff would not  
9 be able to afford the loan and would face the imminent foreclosure of her home.

10           38. The costs fees and interest New Century derived from the loan in question amount  
11 to in excess of \$ 25,000. Executive earned in excess of \$ 35,000 for brokering the loan which  
12 resulted in a cash payment to Plaintiff of approximately \$20,000 and other Defendants earned  
13 significant fees in processing and closing the subject loan. Looking at the figures, it is clear that  
14 this loan was designed not to benefit the Plaintiff and not to be repaid but rather to generate fees  
15 for the Defendants and inevitably result in the foreclosure of Plaintiff's home.

16           39. On or about July 2006, Plaintiff received a bill for her monthly mortgage payment  
17 in the amount of \$5,739.95.

18           40. Plaintiff telephoned Executive's office to inquire about why the amount of the  
19 payment was so high. Plaintiff spoke with Moshe's assistant "Tina". When Plaintiff  
20 complained that the payments were \$1,000 higher per month than her previous payments, not  
21 lower as Moshe had promised, Tina told her that it was too late to do anything because Plaintiff  
22 had already signed the papers. She asked for Moshe to telephone her but, despite repeated calls  
23 to Executive, no one returned her calls.

24           41. Plaintiff grew increasingly concerned about the loan and inquired of several people  
25 regarding loan procedures. She made a complaint to the Office of the Marin County District  
26 Attorney who is presently conducting a criminal investigation of Executive, its officers and  
27 employees as well as the procedures under which the loan was approved by New Century. The  
28



1 office of the District Attorney referred Plaintiff to the Offices of Legal Aid of Marin for further  
2 assistance.

3 42. Plaintiff is informed and believes and on that basis alleges that at all relevant  
4 times, Spear was the only person affiliated with Executive who possessed a real estate broker's  
5 license. By statute, this license permitted Executive's officers and employees to perform  
6 mortgage lending activities. By allowing Executive to operate under the auspices of his license,  
7 Spear became Executive's "designated officer/broker," and as such, was required to supervise  
8 and control the mortgage lending activities of Executive and its employees.

9 43. Upon information and belief, Spear failed in his duty to supervise Executive's  
10 lending activities. Spear failed to establish and/or maintain policies, rules, procedures and  
11 systems to review, oversee, inspect and manage aspects of Executive's business that Spear had a  
12 duty to supervise, including without limitation (a) transactions requiring a real estate license; (b)  
13 documents which may materially affect the rights or obligations of a party to a real estate  
14 transaction; (c) filing, storage and maintenance of such documents; (d) handling of trust funds;  
15 (e) advertising of any service for which a license is required; (f) familiarizing all Executive  
16 employees with federal and state law requirements related to Executive's business activities; and  
17 (g) keeping regular, consistent and accurate reports of licensed activities undertaken by  
18 Executive and its employees.

19 44. At the time Defendants sold Plaintiff the loan by way of the fraudulent and  
20 predatory lending scheme described herein, Plaintiff was 81 years old, low-income and  
21 financially inexperienced. In soliciting, brokering and selling the loan as alleged herein,  
22 Defendants knowingly and with malicious intent made a loan to Plaintiff that they knew she  
23 could not afford to repay and with the intention of enriching themselves and providing no benefit  
24 to Plaintiff.

25 45. As a direct and proximate result of the Defendants' conduct and practices in  
26 targeting Plaintiff as alleged above, Plaintiff's home is now subject to a mortgage in the amount  
27 of \$880,000, which is more than the mortgage Plaintiff had prior to entering the loan; Plaintiff is  
28

1 in arrears of the loan in the approximate amount of \$20,000 or more; has suffered the costs of  
 2 obtaining the loan, including a broker's fee and a yield spread premium; is obliged to pay a  
 3 prepayment penalty of approximately \$35,000 to escape the loan and faces the imminent threat  
 4 of foreclosure on her home.

5  
 6 **FIRST CAUSE OF ACTION**  
**Violations of the TILA and Regulation Z**  
**(Against all Defendants, except Quality and Gateway)**

7  
 8 46. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
 9 through 45 of this Complaint as though fully set forth herein.

10 47. Defendants are creditors within the meaning of TILA.

11 48. The loan transaction entered into by Plaintiff with Defendants is a high-fee loan  
 12 within the meaning of 12 C.F.R. section 226.32(a)(1)(ii).

13 49. Defendants have violated the requirements of TILA and Regulation Z in the  
 14 following and other respects:

- 15 a. by failing to provide in a timely and adequate way the required disclosure,  
 16 commonly known as the "three day right of rescission" in violation of 15  
 17 U.S.C. §1635(a),
- 18 b. by failing to provide the required disclosure in violation of 1638(b) and  
 19 Regulation Z §226.17(b);
- 20 c. by failing to provide the required disclosures clearly, conspicuously in  
 21 writing in violation of 15 U.S.C. §1632 and Regulation Z §226.17(a);
- 22 d. by failing to include in the finance charge certain charges imposed by  
 23 Defendant payable by Plaintiff incident to the extension of credit as  
 24 required by 15 U.S.C. §1605 and Regulation Z §226.4, thus improperly  
 25 disclosing the finance charge in violation of 15 U.S.C. §1638(a)(3) and  
 26 Regulation Z §226.18(d);
- 27 e. by improperly including certain charges in the amount financed which are  
 28 finance charges, Defendant improperly disclosed the amount financed in

violation of 15 U.S.C. §1638(a) (2) and Regulation Z §226.18 (b);

- f. by calculating the annual percentage rate (APR) based upon improperly calculated and disclosed finance charges and amount financed, 15 U.S.C. §1606, Regulation Z §226.22, the defendant understated the disclosed annual percentage rate in violation of 15 U.S.C. §1638 (a) (4) and Regulation Z §226.18(c);
- g. by extending credit to Plaintiff based on Plaintiff's collateral rather than considering Plaintiff's current and expected income, current obligations, and employment status to determine whether Plaintiff was able to make the scheduled payments to repay the obligation in violation of section 129(h) of TILA, 15 U.S.C. §1639(h) and section 226.32(e)(l) of Regulation Z, 12 C.F.R. §226.32(e)(l); and,
- h. by including a prohibited "prepayment penalty" provision in violation of section 129(c) of TILA; 15 U.S.C. §1639(h) and section 226.32(d) (6) of Regulation Z, 12 C.F.R. §226.32(d) (6).

50. Because of the violations of TILA listed above, Plaintiff retained the right to rescind the transaction up to three years after its consummation.

51. On May 8th, 9th, and 10th, 2007, Plaintiff rescinded the instant loan.

52. As a direct and proximate result of the Defendants' wrongful conduct, Plaintiff is entitled to restitution and disgorgement of the wrongful commissions and windfall profits taken by the Defendants as alleged herein. as well as statutory and punitive damages all in an amount to be proven at trial.

53. Plaintiff faces imminent and irreparable injury if the foreclosure of Plaintiff's home is not enjoined.

**SECOND CAUSE OF ACTION  
VIOLATION OF RESPA  
(Against all Defendants, except Quality, Wells Fargo and Gateway)**

54. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1

1 through 53 of this Complaint as though fully set forth herein.

2 55. The home loan which is the subject of this action is a federally related mortgage  
3 loan as defined in the RESPA, 12 U.S.C. §2602.

4 56. Defendants have violated RESPA by failing to make and provide the required  
5 written disclosure, by taking kickbacks and unearned fees, and by making and collecting  
6 prohibited charges in violation of section 8 of RESPA.

7 57. As a direct and proximate result of the Defendants' wrongful conduct, Plaintiff is  
8 entitled to restitution and disgorgement of the wrongful commissions and windfall profits taken  
9 by the Defendants as alleged herein. as well as statutory and punitive damages all in an amount  
10 to be proven at trial.

11 58. Plaintiff faces imminent and irreparable injury if the foreclosure of Plaintiff's  
12 home is not enjoined.

13 **THIRD CAUSE OF ACTION**

14 **Fraud and Deceit**

15 **(As to all Defendants, except Wells Fargo, Quality and Gateway)**

16 59. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
17 through 58 of this Complaint as though fully set forth herein.

18 60. Defendants made false promises and misrepresentations to Plaintiff as alleged  
19 above, including misrepresentations that the loan she was entering into would carry a fixed rate  
20 that would lower her monthly mortgage payments, that would pay off her debts and provide cash  
21 to pay her monthly mortgage payments and that would be free of cost.

22 61. Defendants intentionally concealed from Plaintiff that in inducing Plaintiff to enter  
23 into the loan, Defendants' true intention was to make a loan that would enrich them and that  
24 Defendants knew that Plaintiff could not pay the monthly charges on the loan and would face  
25 foreclosure.

26 62. Defendants engaged in the fraudulent acts and practices alleged above and by  
27 falsifying the contents of the loan application, misrepresenting Plaintiff's income,  
28 misrepresenting the costs and nature of the loan and engaging in fraudulent and illegal practices

1 as alleged above.

2 63. When Defendants made the false promises and misrepresentations and engaged in  
3 deceitful acts as alleged above, Defendants knew that the promises and misrepresentations were  
4 false, that the concealments were deceitful, and that the false promises, misrepresentations and  
5 deceitful acts and concealments were intended by them to deceive and defraud Plaintiff and to  
6 fraudulently induce her to enter into the loan, to her detriment.

7 64. In entering into the loan, Plaintiff actually and reasonably relied on Defendants'  
8 false promises, misrepresentations and concealments. Plaintiff would not have entered into the  
9 loan or followed Defendants' instructions to sign the loan documents had she known the true  
10 facts about Defendants' false promises, misrepresentations, concealments and deceitful acts and  
11 practices.

12 65. As a direct proximate and legal result of the Defendants' acts alleged herein,  
13 Plaintiff has suffered damages in an amount to be proven at trial. Defendants have engaged in  
14 the fraudulent promises, misrepresentations, concealments and deceitful acts and practices  
15 alleged herein with malice and with the intent to deceive and injure Plaintiff. Plaintiff is  
16 therefore entitled to an award of punitive damages in an amount according to proof.

17 **FOURTH CAUSE OF ACTION**  
18 **Elder Abuse [Welfare and Institutions Code 15600]**  
19 **(As to all Defendants, except Gateway)**

20 66. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
21 through 65 of this Complaint as though fully set forth herein.

22 67. At all relevant times herein, Defendants stood in a position of trust and confidence  
23 to Plaintiff in that they were mortgage brokers, financial advisors and fiduciaries, as alleged  
24 above, and owed Plaintiff a duty of the utmost care, diligence, good faith, loyalty and fair  
25 dealing.

26 68. Defendants, with knowledge that Plaintiff is an elder, gained Plaintiff's trust and  
27 induced her to enter into a detrimental loan. By their acts, Defendants appropriated Plaintiff's  
28 personal and real property to a wrongful use and with the intent to defraud, or assisted in such

1 acts. Defendants acted in bad faith as they knew or should have known that Plaintiff had the  
2 right to the property illegally appropriated by them.

3 69. By these acts, Defendants, with knowledge that Plaintiff is an elder, willfully  
4 caused or permitted Plaintiff to suffer, inflicted mental suffering on her, and have endangered  
5 her health and person.

6 70. As a direct and proximate result of the Defendants' elder and financial abuse of  
7 Plaintiff as alleged herein, Plaintiff has sustained and suffered injury to her person, all which  
8 injuries have caused and continue to cause Plaintiff great mental and nervous pain and suffering  
9 for which Plaintiff will have to seek reasonably necessary medical services in an amount to be  
10 proven at trial.

11 71. As a further direct and proximate result of the Defendants' wrongful conduct,  
12 Plaintiff has sustained financial damages in an amount to be proven at trial.

13 72. As a further direct and proximate result of the Defendants' wrongful conduct,  
14 Plaintiff has incurred attorney fees and legal costs, and will sustain additional damages in  
15 prosecuting this action and Plaintiff is entitled to recover these based on contract and/or statute,  
16 including, but not limited to Code of Civil Procedure section 1021.5 and Welfare and Institutions  
17 Code section 15657(a).

18 73. As a further result of Defendants' wrongful conduct, Plaintiff is entitled to have  
19 her damages trebled pursuant to Welfare and Institutions Code section 15657.

20 74. Defendants are guilty of fraud, oppression, malice or recklessness in the  
21 commission of the financial and elder abuse alleged above with the intent to deceive and injure  
22 Plaintiff thereby entitling Plaintiff to punitive damages in an amount according to proof.

23 **FIFTH CAUSE OF ACTION**  
24 **Breach of Fiduciary Duty**  
25 **(Against all Defendants, except Quality)**

26 75. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
27 through 74 of this Complaint as though fully set forth herein.

28 76. Defendants acted in the capacity of a mortgage loan broker and/or financial

1 advisor or escrow agent for Plaintiff and thereby owed a fiduciary duty to Plaintiff.

2 77. Plaintiff understood that Defendants were acting on her behalf in the capacity of a  
3 mortgage broker, fiduciary and/or financial advisor to her.

4 78. Defendants owed Plaintiff a fiduciary duty of the highest good faith, fair dealing,  
5 loyalty, honesty and truthfulness toward Plaintiff and were charged with a duty of full disclosure  
6 of all material facts concerning the transactions described herein that might have affected  
7 Plaintiff's decision to enter into the loan.

8 79. In addition, Gateway entered into a contract with Wells Fargo and Plaintiff to  
9 perform the duties of escrow agent for closing the subject loan. The escrow instructions gave  
10 rise to a fiduciary duty to carry out the instructions. Pursuant to closing instructions dated on or  
11 about June 8, 2006, Gateway was to deliver "recission notice: two copies to each borrower  
12 complete with accurate transaction and cancellation dates." Gateway failed to deliver these  
13 documents to Plaintiff.

14 80. Upon information and belief, Defendants breached their fiduciary duty to Plaintiff  
15 by engaging in the fraudulent conduct alleged herein, including without limitation the following  
16 acts and omissions:

- 17 a. Defendants misrepresented to Plaintiff the nature and effect of the loan  
18 application documents presented to her for signature;  
19 b. Defendants failed to act in good faith and in the best interest of Plaintiff;  
20 c. Defendants charged excessive fees and costs;  
21 d. Defendants failed to provide proper notices, copies, and disclosures as  
22 required by law;  
23 e. Defendants failed to properly advise Plaintiff of the true nature and effect  
24 of the transaction;  
25 f. Defendants failed to consider the interests of Plaintiff before their own;  
26 and,  
27 g. Defendants unjustly profited from the transaction.  
28





1 promised terms and with the required delivery of disclosures and documents. as alleged above.

2 91. As a direct and proximate result of Defendants' breach of contracts, Plaintiff has  
3 sustained monetary damages in an amount to be determined at trial.

4 **SEVENTH CAUSE OF ACTION**  
5 **Recessionary damages and Restitution**  
6 **(Against all Defendants, except Quality)**

7 92. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
8 through 91 of this Complaint as though fully set forth herein.

9 93. Plaintiff's consent to the loan was obtained by the Defendants through mistake,  
10 fraud and undue influence.

11 94. Defendants, with intent to deceive Plaintiff and to unduly influence her to consent  
12 to the loan which they knew or should have known Plaintiff did not understand or agree to and  
13 which they knew or should have known Plaintiff did not have sufficient income to pay, did  
14 intentionally conceal from Plaintiff the true terms of the loan and failed to provide statutory  
15 notices mandated by federal and state law including but not limited to "Notice of right to  
16 Cancel" the subject loan. with the knowledge that she did not have sufficient income to repay  
17 and that she was thereby placing her home at severe risk of loss to foreclosure.

18 95. The active misrepresentations of Defendants were deceitful, fraudulent and false.

19 96. At the time Defendants made the misrepresentations and engaged in the  
20 concealment and deceit as alleged herein, she reasonably relied on them, thereby entering into  
21 the loan without the benefit of true facts and by duress, undue influence, coercion and mistake.

22 97. As a result of Defendants' fraudulent misrepresentations, deceit and inducements  
23 alleged herein, Plaintiff has incurred monetary damages.

24 98. Plaintiff demands rescission on the ground of Defendants' fraudulent  
25 misrepresentations and inducements, mistake, duress, undue influence and coercion.

26 99. Plaintiff demands restitution from Defendants in an amount that will restore to  
27 Plaintiff the amounts taken from her including but not limited to all costs, fees, commissions,  
28 yield spread premiums and loan proceeds received by the Defendants. Plaintiff further alleges

1 that that Defendants have been unjustly enriched by their predatory loan practices and that the  
 2 full amount of all commissions earned by Defendants on the loan and all amounts converted by  
 3 the Defendants must be disgorged to Plaintiff.

4 100. Plaintiff faces imminent and irreparable injury in that Defendants will foreclose on  
 5 Plaintiff's home.

6  
 7 **EIGHTH CAUSE OF ACTION**  
**Unfair Business Practices [Business & Professions Code Section 17200]**  
**(As against all Defendants)**

8 101. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
 9 through 100 of this Complaint as though fully set forth herein.

10 102. Defendants committed acts of unfair business practices, as defined by the  
 11 California Business and Professions Code Section 17200 et seq., by engaging in practices which  
 12 include but are not limited to the subject acts and practices alleged above and further including  
 13 but not limited to making loans to borrowers based on information that Defendants knew or  
 14 should have known was inaccurate or incorrect; making loans without verifying borrower  
 15 information; making loans without providing the borrower with accurate and understandable  
 16 information regarding the nature and extent of the financial risk being assumed by the borrower;  
 17 making loans without regard to the borrower's ability to repay the loan; misleading the borrower  
 18 regarding the terms of loans, proceeding with the foreclosure when the underlying security  
 19 interest had been canceled.

20 103. These deceptive acts and practices and the fraudulent and predatory lending  
 21 scheme alleged herein violate California Business and Practices Code Section 17200 in the  
 22 manner alleged above and in the following respects: Defendants' conduct threatens an incipient  
 23 violation of various consumer protection statutes, and/or violates the policy or spirit of such  
 24 laws, including but not limited to California Financial Code Section 4970 et seq.; California  
 25 Civil Code Section 1770 et seq.; California Civil Code Section 1788.12; California Civil Code  
 26 Section 1920; California Civil Code Section 1921; California Civil Code Sections 1709, 1710,  
 27 1711; Section 1629 of Title 15 of the United States Code together with 12 CFR 226.1  
 28

(Regulation Z); Section 1691 of Title 15 of the United States Code; Section 3605 of Title 42 of the United States Code; and Section 2602 of Title 12 of the United States Code; which prohibit, among other things, and provide penalties for, deceitful, dishonest and discriminatory and predatory lending practices, including but not limited to making mortgage loans without regard to the borrower's ability to repay; making mortgage loans based on deceptive, fraudulent or unconscionable advertising, and/or representations or practices in violation of lending disclosure laws; making loans subject to illegal kickbacks and/or unearned fees; and making loans subject to excessive loan costs and fees and other abusive loan terms as alleged herein.

104. Defendants' predatory lending practices, as alleged above, constitute unlawful, unfair and fraudulent business acts or practices within the meaning of California Business and Professions Code Section 17200.

105. Defendants' unlawful, unfair and fraudulent business practices target the most vulnerable people in our society, including, as exemplified by Plaintiff, elderly, minority, low-income, financially unsophisticated homeowners who are at high risk of losing their homes as a result of the predatory lending practices alleged herein. Unless restrained, Defendants will continue these unlawful and unfair predatory practices and continue to sell these abusive home equity products to homeowners who are unable to afford them and unaware of their true nature, terms, costs and consequences. Plaintiff is therefore entitled to a permanent injunction enjoining Defendants from engaging in the fraudulent, deceptive, predatory and negligent acts and practices alleged herein.

106. As a direct and proximate result of the aforementioned acts, Defendants caused Plaintiff to become obligated on a loan she could not afford to repay, and put her at risk of losing her home as alleged above.

107. As a further direct and proximate result of Defendants' wrongful conduct as alleged above, Plaintiff has sustained damages, including attorney's fees and legal costs, and will sustain additional damages in prosecuting this action. Plaintiff is entitled to an award of attorney's fees and legal costs pursuant to California Code of Civil Procedure Section 1021.5.

1           108. As a further direct and proximate result of the Defendants' wrongful conduct,  
2 Plaintiff is entitled to restitution and disgorgement of the wrongful commissions and windfall  
3 profits taken by the Defendants as alleged herein.

4           109. Plaintiff faces imminent and irreparable injury in that Defendants will foreclose on  
5 Plaintiff's home.

6                                   **NINTH CAUSE OF ACTION**

7                                   **Negligence**

8                                   **(As to all Defendants)**

9           110. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
10 through 109 of this Complaint as though fully set forth herein.

11           111. At all relevant times herein, Defendants owed a duty to Plaintiff to exercise  
12 reasonable care in the processing of her loan application, advising her on financial matters,  
13 distributing her loan proceeds and dealing with the foreclosure of her home.

14           112. Defendants also owed Plaintiff a duty of reasonable care to train their employees  
15 and agents to comply with all applicable laws, rules and/or regulations and in accordance with  
16 professional, industry-wide best practices standards. These laws, rules, regulations and industry-  
17 wide best practices standards were enacted to protect individuals such as Plaintiff.

18           113. Defendants owe Plaintiff a duty of reasonable care to supervise, regulate and  
19 control their employees to ensure compliance with all applicable laws, rules and regulations in  
20 accordance with professional, industry-wide best practices standards. These laws, rules,  
21 regulations and industry-wide best practices standards were enacted to protect individuals such  
22 as Plaintiff.

23           114. Defendants breached these duties to Plaintiff.

24           115. As a direct and proximate result of Defendants' negligence as alleged herein,  
25 Plaintiff has suffered injuries and damages as set forth above in an amount to be determined at  
26 trial.

27           116. Defendants' breaches of their duty of care affect the most vulnerable people in our  
28 society, including, as exemplified by Plaintiff, elderly minority, low-income, financially  
unsophisticated homeowners who are at high risk of losing their homes as a result of the

1 fraudulent and predatory practices alleged herein. Unless restrained, Defendants will continue  
 2 these unlawful practices and continue to sell these abusive home equity products to homeowners  
 3 who are unable to afford them and unaware of their true nature, terms, costs and consequences.  
 4 Plaintiff is therefore entitled to a permanent injunction enjoining Defendants from engaging in  
 5 the acts and practices alleged herein.

### 6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiff prays for judgment against the named Defendants and Does 1-20  
 8 as follows:

- 9 1. For a preliminary injunction enjoining Wells Fargo and any successor in interest  
 10 from foreclosing on Plaintiff's home pending adjudication of Plaintiff's claims set forth herein;  
 11
- 12 2. For a permanent injunction enjoining Defendants from engaging in the fraudulent,  
 13 deceptive, predatory and negligent acts and practices alleged herein;  
 14
- 15 3. For rescission of the loan contract and restitution by Defendants to Plaintiff  
 16 according to proof at trial;  
 17
- 18 4. For disgorgement of all amounts wrongfully acquired by Defendants according to  
 19 proof at trial;  
 20
- 21 5. For monetary damages according to proof at trial;  
 22
- 23 6. For pre-judgment and post-judgment interest according to proof at trial;  
 24
- 25 7. For pain and suffering damages according to proof at trial;  
 26
- 27 8. For punitive damages according to proof at trial; and,  
 28
9. For attorney's fees and costs as provided by statute.

Plaintiff demands trial by jury on all issues so triable.

23 DATED: September 26, 2007

Respectfully submitted,

LAW OFFICES OF ROBERT KANE  
 LEGAL AID OF MARIN  
 COMMUNITY LEGAL SERVICES IN  
 EAST PALO ALTO

27 BY: /s/  
 28 SHIRLEY HOCHHAUSEN  
 Attorney for Plaintiff Audrey McNamara Nevis